INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE

RESUMED NINTH MEETING OF THE AD HOC OPEN-ENDED WORKING GROUP
TO ENHANCE THE FUNCTIONING OF THE MULTILATERAL SYSTEM

Rome, Italy, 24–26 October 2019

ENHANCING THE FUNCTIONING OF THE MULTILATERAL SYSTEM:
NON-PAPER BY THE CO-CHAIRS

Note by the Secretary

This document contains a note prepared by the Co-chairs, with the support of the Secretariat, to provide an overview of the current status of discussions on the possible package of measures, and a summary of the main outstanding issues from the first part of the Ninth Meeting of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System.

The Co-chairs offer a number of suggestions to the Working Group on some of the elements of the package of measures, in order to further facilitate discussions at its resumed ninth meeting.
INTRODUCTION

1. The Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System (Working Group) held its ninth meeting from 17 to 21 June 2019, in Rome, Italy. The meeting was suspended to allow for additional time to finalize negotiations on a few outstanding issues. The resumed meeting of the Working Group will take place from 24-26 October in Rome, Italy.

2. We, as Co-chairs, would want to highlight the significant progress the Working Group made during the first part of its meeting and we would like to thank the Working Group for their impressive dedication, their hard work and their strong willingness to compromise to arrive to a successful result – with constructive discussions going very late into the night. For us, as Co-chairs, these were very encouraging signals that give us hope for bringing this meeting to a successful conclusion next week in Rome, to finalize our work on the package of measures that will be submitted to the Eighth Session of the Governing Body, for its consideration.

3. The Working Group considered and reviewed a compromise proposal of the Co-Chairs for the package of measures on the enhancement of the Multilateral System.

4. Significant progress was made and agreement was reached on all elements of the package of measures, as provided in the Interim Report of the ninth meeting of the Working Group.

5. Since we will be resuming our ninth meeting, we will continue our work based on the Interim Report agreed in June. We will also be using the same documentation that had been prepared for that meeting. This non-paper was prepared by the Co-chairs under their own authority and without prejudice to any Working Group Member’s position. It summarizes the key outstanding issues that still need to be discussed and agreed upon during the resumed session of the Working Group, with the aim of further supporting Working Group Members’ preparations.

6. When we gather again in Rome for finalizing our work, the Co-chairs call upon all Members of the Working Group and the representatives of stakeholder groups to be fully aware of our common responsibility to make the Multilateral System work even better than it does now.

7. Finally, to facilitate and structure our discussions during the resumed meeting, we prepared a tentative timetable that we have included in Annex 1 of this document.

I. OVERVIEW OF MAJOR OUTSTANDING PROVISIONS IN THE DRAFT REVISED SMTA

A. Definitions (Article 2):

- “Sales”:
  The Co-chairs propose to finalize the discussions on the basis of the alternative definition (Interim Report, page 27, lines 8 to 10).

  This alternative definition was inserted following extensive consultations by the Co-chairs with regions and stakeholder representatives. It seeks to address the problem put forward by users about having to monitor payments due by third parties they have no control of, as discussed by the Working Group previously. Under this alternative definition, the Recipient (or Subscriber) would need to consider its own income and the income of its affiliates, both in terms of income generated from commercialization and in the form of license fees. Also, this definition uses “PGRFA” rather than “Product or Products”.

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1 IT/OWG-EFMLS-9/19/Interim Report.


3 For further information please consult the explanatory notes in the document IT/OWG-EFMLS-9/19/4 Add.2, paras. 58-61.
As soon as we could agree on the general approach of the alternative definition, we would need to decide on the following:

- Whether the term “license fees for PGRFA” works or what alternative formulation could be used for capturing license fees;
- For the license fees the Co-chairs would also like to recall that doubts were raised as to the possible need of applying a higher rate on license fees compared to income from commercialization. Since license fees are usually a percentage of income from commercialization, the alternative definition might privilege license fees over commercialization, compared to the current definition;
- Whether or not to include language on PGRFA information (“genetic sequence data” as in the text of the revised SMTA). We suggest to discuss this aspect in the context of our overall discussions of PGRFA information.

**“To commercialize”:**

The Co-chairs suggest finalizing our discussions on the basis of the alternative definition (Interim Report, page 27, lines 16 to 20).

This alternative definition builds on the alternative definition of “Sales” mentioned above. It refers to “exchanging” rather than “selling” and it uses “PGRFA” rather than “Product or Products”. Due to the use of “PGRFA”, the addition “nor shall it include the sale of commodities and other products used for food, feed and processing”, which is contained in the definition of “Product”, was inserted.

### B. Articles 6.7, 6.8, 6.8 BIS:

The Co-chairs are of the view that the brackets around these three articles can be lifted since the Working Group discussed and agreed on them. Changes were made at our meeting in June for the sake of clarity and to define the period for the payment obligations (period of the restriction, ten years, not more than 25 years total). Furthermore, the Co-chairs would like to remind the Working Group of their proposal to further simplify these Articles, as provided in the document IT/OWG-EFMLS-9/19/4 Add.2, page 29.

### C. Transitional phase (Article 9.6):

The Co-chairs consider it a major success that the Working Group demonstrated a clear willingness to compromise by reaching a preliminary agreement on the entry into force of the package of measures, as contained in the draft Resolution, in particular paragraphs 36 to 40. We think that Article 9.6 of the revised SMTA now needs to be cross checked and aligned with the agreed text in the draft Resolution, so that the revised SMTA contains language that works contractually. In this context, we need to strive for clarity and legal certainty, so that users clearly know what would happen under which circumstances at which point in time. As Co-chairs, we are optimistic that we can find adequate language for the revised SMTA, building on the important agreement (ad ref) we could reach in June on the entry into force of the package of measures.

### D. Annex 2: single access:

Only the payment rates in Articles 1 and 2 of Annex 2 still need to be defined.

The Co-chairs suggest seeking agreement on their compromise proposal tabled in June, namely (a) 0.2% minus 30% for “the 6.8 option” and (b) 2.0% minus 30% for “the 6.7 option”.

An editorial issue to discuss would be to opt for one of the two titles currently provided for Annex 2.
E. Monetary benefit-sharing provisions under the Subscription System (Article 3 of Annex 3):

Apart from the bracketed parts related to PGRFA information, which we suggest discussing in the context of our overall discussions of that issue, three main issues still need to be considered:

1. **Article 3.1 (payment basis):** Further discussions are needed to reach agreement on the basket of crops (PGRFA covered by the MLS or PGRFA listed in Annex 1) to be taken into account for the calculation of the benefit-sharing payments under the Subscription System. Consideration of the definitions in Article 2 may be needed (especially of “Sales”, “Product” and “PGRFA”).

2. **Articles 3.2, 3.2 BIS, 3.2 ALT, alternative versions of Articles 3.2 and 3.2 BIS (differentiated rates or single payment rate):** We need to agree on which of these options to retain. We could still not agree on establishing a single payment rate for the Subscription System (Article 3.2 ALT), so that two proposals for differentiated rates depending on whether or not the product is available without restriction are still on the table. The two alternative formulations for differentiated rates both offer a choice to the Subscriber regarding the rates. If one of the options were retained, the mechanics of exercising this choice would still need to be worked out. Once the Working Group will agree on the general approach for these Articles, the brackets can be cleaned-up, aligning the language with the language agreed upon for Article 3.1.

3. **Payment rate:** In case a single payment rate is retained, the Co-chairs suggest seeking agreement on their compromise proposal tabled in June, namely 0.015%.

4. **Article 3.3 (threshold for payment requirement):** There seems to be a common understanding that no payment shall be required for a subscriber in a year in which its sales do not exceed a specific amount. The only outstanding element in Article 3.3 is to define this amount. The Co-chairs note that a proposal was made by one region to set the amount at USD 5 million and we would suggest starting our discussions from this figure.

F. Withdrawal from and termination of the subscription (Article 4, Annex 3):

**Article 4.4 (obligations of the subscriber upon withdrawal):** Regarding the continued benefit-sharing obligations after the end of the Subscription, we practically reached a compromise on setting the time limit to two years, pending only the final agreement on the payment rates.

This article also provides for a number of surviving obligations and we only need to agree on whether or not to retain Article 6.10 in the list (the reference to Article 9.4 can be deleted, as it is an editorial leftover).

**Article 4.5 (right of Third Party Beneficiary in case of material breach):** The Working Group will need to discuss and decide on:

(i) the facts that need to be established: “presumed”, “alleged”, “suspected” or “found at fault for” material breach by the Subscriber; and

(ii) the consequences/options for the TPB: terminate, claim damages, exclude from subscribing in the future.

Once the Working Group can reach agreement on this Article, consideration of the bracketed placeholder in Article 8 will be needed.

**Article 4.5 BIS (rights of the subscriber to withdraw):** This provision relates to a new proposal introduced at our last meeting, seeking to balance the right of the TPB to terminate the subscription in case of material breach with a right of the subscriber to terminate its subscription on grounds of not duly receiving PGRFA from the MLS as per the Subscription Terms.
G. Other provisions:

- **Article 6.2 (Intellectual Property Rights or other rights limiting facilitated access to the Material):**
  The Co-chairs believe that we can agree on this Article *ad ref*. We recall that the Working Group generally agreed on Article 6.2 because it is language that the Treaty requires in the SMTA. In this regard, the Working Group opted not to make any changes or additions. The proposed addition referring to farmers’ Rights was consequently moved to the draft Resolution, where it still needs to be discussed and agreed.

- **Article 6.9 (provision of information):**
  Divergent views remain on whether to include explicit reference to genetic sequence data (PGRFA information). We suggest to discuss this aspect in the context of our overall discussions of PGRFA information.

- **Article 6.10 (Intellectual Property Rights on Products):**
  Discussions could not be finalized, pending consultations by some Working Group members with their Intellectual Property experts.

- **Article 5e (confidentiality):**
  The Co-chairs are of the view that the last two sentences of this Article were already “agreed *ad ref*”.

II. **ELEMENTS IN THE DRAFT RESOLUTION RELATING TO THE REVISED SMTA**

**Paras 4, 14, 14 ALT and 14 ALT BIS: Exemptions from benefit sharing obligations, rights of farmers and indigenous peoples:** there remain divergent views on whether exemptions from benefit-sharing obligations should be established for certain categories of users in developing countries such as family farmers, indigenous peoples, small plant breeding companies, public institutions. Different formulations are offered in these paragraphs. In addition, paragraph 4 provides that the rights of farmers and indigenous communities to conserve, exchange and use the Material available in the MLS are preserved. The divergence of views essentially relates to the following questions.

- Whether or not these entities should actually be exempted from payment obligations or from an obligation to sign the SMTA;
- What the benefits of these provisions in terms of clarity for the Providers could be;
- Whether and how problems of definition could be avoided, for example how to define small scale farmers or family farmers? (bearing in mind that the term ‘family farmers’ is not a universally defined term- i.e. different implications depending on how countries define who belongs to the “small farmer” category).

Once we are able to clarify these questions, we may want to look at the various alternative formulations currently contained in the draft Resolution and decide which one to retain.

Our understanding is that Argentina has prepared a proposal for paragraph 14 that they will share with the Working Group to help us reach consensus.

**Para 5:** Our understanding is that France has prepared a proposal for paragraph 5 that they will share with the Working Group for discussion.
Para 15: Our understanding is that Argentina has been consulting with other Parties on this and will report back to the Working Group on it.

III. ELEMENTS OF THE DRAFT RESOLUTION RELATING TO THE AMENDMENT OF ANNEX I

A further major outcome of the first part of the ninth meeting is the agreement (ad ref) on a proposed text for amending Annex I of the International Treaty, as recorded in Appendix 2 of the draft Resolution. The amendment text provided in Appendix 2 (Article 1) was agreed ad ref. The additional text in Article 2 seeks to operationalize the agreement of the Working Group on paragraph 27 of the draft Resolution.⁴

Para 23: As this paragraph only refers to encouraging Contracting Parties to provide access according to the terms and condition of the MLS to all PGRFA, we believe that it can be agreed ad ref.

IV. PGRFA INFORMATION

There is some level of agreement among the group that “digital sequence information” is only a working term and that the term “genetic sequence data” or “information associated with PGRFA” may be more appropriate.

There are still quite divergent views on this issue:

- Some are of the view that genetic material and information are defined and addressed separately in the Treaty, and information cannot be considered as genetic material.
- Others are of the view that genetic material includes genetic information and sequencing and that it should be addressed.

The Co-chair believe that the compromised language proposed by the Co-chair at the meeting in June was balanced and that it could be the basis for further discussions.

(1) For the revised SMTA, the Co-chairs made the following proposal:

- Possible revised Article 3.2 ALT of Annex 3:

“The applicable rate of payment on Sales in relation to Plant Genetic Resources for Food and Agriculture listed in Annex I of the Treaty, including Sales of associated information, shall be [XX]%.”

- Possible revised Article 1 of Annex 2

“If a Recipient or any of its affiliates commercializes a Product or Products that are not available without restriction to others for further research and breeding in accordance with Article 2 of this Agreement, the Recipient shall pay each year [one point-one percent (1.1 %) of the annual Sales of the Product or Products, and of information associated with the Product or Products, less thirty percent (30%)] [[yy] percent (yy %) of the annual Sales of the Product or Products].”

(2) The compromise language for elements of the draft Resolution is contained in paras 29-35 of the draft Resolution.

⁴ “27. Decides that after the entry into force of this amendment, any ratification, acceptance or approval of or accession to the International Treaty includes this amendment; (AGREED AD REF)”
### ANNEX I: PROVISIONAL TIMETABLE: RESUMED WG-9: 24-26 OCTOBER 2019

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<thead>
<tr>
<th>Morning 9:30-12:30</th>
<th>Afternoon 14:00-17:00</th>
<th>Evening 18:30-21:30</th>
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<tr>
<td><strong>Thursday 24 October</strong></td>
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<tr>
<td>• Opening</td>
<td>• Revised SMTA (cont’d):</td>
<td>• Evening session with interpretation available as of 18:30</td>
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<tr>
<td>• General introduction by the Co-Chairs, including stock taking of WG-9 outcomes, outstanding issues (start with WG-9 report, para. 17), overview of regional preparatory meetings</td>
<td>o Single Access System (Annex 2)</td>
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<td>o Monetary benefit-sharing Subscription System (Annex 3, Art. 3)</td>
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<td>o Withdrawal and termination Subscription System (Annex 3, Art. 4)</td>
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<td>• Revised SMTA:</td>
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<td>o Definitions (Article 2)</td>
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<td>o Single Access System (Arts. 6.7 and 6.8)</td>
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<td>o Transitional phase (Art. 9.6)</td>
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<tr>
<td><strong>Friday 25 October</strong></td>
<td>• Resolution: Elements in relation to the amendment (para. 23)</td>
<td>• Evening session with interpretation available as of 18:30</td>
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<tr>
<td>• Resolution: Elements in relation to the amendment (para. 23)</td>
<td>• PGRFA information, including elements for Resolution (paras. 29-35)</td>
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<tr>
<td>• PGRFA information, including elements for Resolution (paras. 29-35)</td>
<td>• Revised SMTA: second reading</td>
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<td><strong>Saturday 26 October</strong></td>
<td>• Finalization of discussions on the text of the Resolution</td>
<td>• Adoption of the Report</td>
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<tr>
<td>• Finalization of discussions on the text of the Resolution</td>
<td>• Other matters</td>
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<td>• Other matters</td>
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